



# Institutional Foundations for Effective Anti-Cartel Policy

---

William E. Kovacic  
U.S. Federal Trade Commission  
Competition Day, Santiago  
September 9, 2009



## Today's Theme

---


- Two Major Questions
  - What is a good competition policy system?
  - How does a competition policy system achieve effectiveness
- Application to Anti-Cartel Policy
- Caveat: Personal Views



## Resources

---

- *The FTC at 100* (January 2009), available at [www.ftc.gov](http://www.ftc.gov) [reports]
- Anderson & Kovacic, 16 Public Procurement Law Review (2009)
- Heeb, Kovacic, Marshall & Marx, 10 Chicago Journal of Int'l Law (2009)



## What Is a Good Competition Policy System?

---

- It Improves Economic Performance
- Usual Proxy for Effectiveness: Activity
- Activity Is Not Accomplishment



## How Can a Competition System Achieve Effectiveness?

---

- Define Goals
- Set Strategy
- Apply Collection of Policy Tools
- Build Strong Internal Quality Control
- Invest in Building Knowledge
- Evaluate Programs and Processes
- Theme: Continuous Improvement



## Setting an Anti-Cartel Strategy: Five Variables

---

- What Is the Legal Standard?
- Will Infringements be Detected?
- Will Infringements be Prosecuted?
- Will Tribunals Find Guilt?
- How Will Infringements be Punished?



## Key Characteristics

---

- Interdependencies
  - Detection and sanctions: Complements and substitutes
- Equilibration: Proof/Penalties
  - Procurement first strategy
- Dynamism and Strategic Adjustment



## Modern Boost in Remedies

---

- Increased Civil Damages
  - Private rights to compensate victims
- Criminal Individual Responsibility
- Focus: Cartels
- Impact on Doctrine: Incentive to Define and Apply Per Se Rule



## Agreements Among Rivals

---

- Identifying Concerted Action
  - Pre 1890: reliance on overt agreements
  - Antitrust laws drive cartels underground
- Defining Improper Conduct
  - Setting prices
  - Setting output
  - Setting other terms (e.g., credit)



## Concerted Action: Direct Evidence

---

- Testimony and Documentary Proof
- Stronger Information Gathering
- Incentives to Reveal Direct Evidence
  - Amnesty/Leniency



## Evaluation and Refinement

---

- Is It Working?
  - Impact on performance: e.g., procurement
  - Processes
- Research Program
- Upgrades



## Concluding Thoughts: New Directions

---

- Links Between Liability Theories
  - Cartels
  - Mergers
  - Monopolization
- Ethic of Continuous Improvement
  - The Chilean example
  - Old systems and new systems